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No. 09-346

In the Supreme Court of the United States

JUAN JOSE MARTINEZ-MADERA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a child born abroad to unmarried, alien parents may nevertheless be deemed to have acquired United States citizenship at birth when a United States citizen later marries his mother and treats the child as his own son.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A23) is reported at 559 F.3d 937. The opinions of the Board of Immigration Appeals (Pet. App. A24-A29) and the immigration judge (Pet. App. A33-A47) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 2009. A petition for rehearing was denied on June 18, 2009 (Pet. App. A48). The petition for a writ of certiorari was filed on September 15, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Under certain circumstances, the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, pro-

vides that a person born outside the geographical limits of the United States and its outlying possessions may acquire United States citizenship at birth. Specifically, when a child is born "of parents one of whom is an alien, and the other a citizen of the United States who prior to the birth of such person, was physically present in the United States or its outlying possessions" for a prescribed period, that person is deemed a national and citizen of the United States at birth. 8 U.S.C. 1401(a)(7) (1952) (current version at 8 U.S.C. 1401(g)).

The INA imposes additional requirements on a child born out of wedlock outside the United States before that child may be deemed to have acquired United States citizenship at birth under 8 U.S.C. 1401. As provided in 1952, a child born out of wedlock abroad could claim citizenship based on his father's United States citizenship only "if the paternity of such child is established while such child is under the age of twenty-one years by legitimation." 8 U.S.C. 1409(a) (1952).

In 1986, Congress amended 8 U.S.C. 1409(a) to allow a child born out of wedlock abroad to unmarried parents to claim citizenship from birth under 8 U.S.C. 1401 only if (1) a "blood relationship between the child and the father is established by clear and convincing evidence"; (2) the father was a United States citizen at time of the child's birth; (3) the father has agreed in writing to support the child financially until he reaches age 18; and (4) before the child turns 18, the father formally acknowledges paternity in any of a number of ways, including legitimating the child under the law of the child's residence or domicile, obtaining an adjudication of paternity by a court, or simply by acknowledging paternity in writing under oath. Immigration and Nationality Act

Amendments of 1986, Pub. L. No. 99-653, § 13, 100 Stat. 3657 (8 U.S.C. 1409(a) (Supp. IV 1986)).

b. From 1872 to 1975, Section 230 of the California Civil Code provided: "The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, * * * into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth." Cal. Civ. Code § 230 (West 1954) (repealed 1976).

Effective January 1, 1976, California repealed former Section 230 and enacted its version of the Uniform Parentage Act, now codified at Cal. Fam. Code §§ 7600 *et seq.* (West 2004 & Supp. 2009), which provides (as relevant here): "A man is presumed to be the natural father of a child if he * * * receives the child into his home and openly holds out the child as his natural child." *Id.* § 7611(d) (Supp. 2009). The "presumption under Section 7611 is a rebuttable presumption affecting the burden of proof and may be rebutted * * * by clear and convincing evidence." *Id.* § 7612(a).

2. Petitioner was born in Mexico in 1953. Pet. App. A5. His biological mother and father were Mexican citizens, and they were never married. *Ibid.* Later in 1953, petitioner's mother met Jesus Gonzalez, a United States citizen, and began a relationship with him. *Ibid.* In 1960, petitioner's mother and Gonzalez were married, and they moved with the entire family (including several other children of petitioner's mother and Gonzalez) to California in 1965, when petitioner was 12 years old. Pet. 11; Pet. App. A5.

Petitioner was admitted as a lawful permanent resident when he moved to California in 1965. Pet. 11; Pet. App. A36. The entire family lived together with Gonza-

lez in California, and Gonzalez publically identified himself as petitioner's father, though he never legally adopted petitioner. *Id.* at A6, A40. Petitioner's mother later became a naturalized United States citizen in either 1981, *id.* at A36; Pet. 10, or 1995, Pet. App. A6. There is no evidence that petitioner ever attempted to become naturalized. *Ibid.*

3. On October 25, 1996, in the Superior Court of California, County of Santa Clara, petitioner was convicted of attempted murder, for which he served an enhanced eight-year sentence in prison until his release on September 22, 2005. Pet. 8; Pet. App. A6. On September 8, 2005, the Department of Homeland Security commenced removal proceedings against petitioner on the ground that he was removable as an aggravated felon under 8 U.S.C. 1227(a)(2)(A)(iii). Pet. App. A6, A34.

Before an immigration judge (IJ), petitioner conceded that he had been convicted of attempted murder. Pet. App. A36-A37. Nonetheless, petitioner argued that he was not subject to removal because he derived United States citizenship through his stepfather, Gonzalez. *Id.* at A38. Specifically, he argued that Gonzalez had legitimated him under Section 230 of the California Civil Code by receiving him into his family and otherwise treating him as if he were his legitimate child, thereby satisfying the requirements of 8 U.S.C. 1401 and 1409(a). See Pet. App. A41-A42.

Noting that petitioner's biological parents were unmarried, non-United States citizens at the time of his birth, Pet. App. A41, the IJ concluded that petitioner could not derive citizenship through Gonzalez, *id.* at A43. The IJ rejected petitioner's argument that he acquired citizenship on the theory that Gonzalez legitimated him under Section 230, concluding that Section

230 provided only for biological fathers to legitimate their children born out of wedlock. Pet. App. A42-A43.

Petitioner appealed to the Board of Immigration Appeals (BIA), arguing that legitimation under 8 U.S.C. 1409(a) was not limited to the biological father because two Ninth Circuit cases had held that a child may derive citizenship from a United States citizen who is not the child's biological father. Pet. App. A25-A26; see *Scales* v. *INS*, 232 F.3d 1159 (9th Cir. 2000); *Solis-Espinoza* v. *Gonzales*, 401 F.3d 1090 (9th Cir. 2004). On May 30, 2006, the BIA dismissed petitioner's appeal, concluding that petitioner did not derive citizenship from Gonzalez. Pet. App. A24-A29. The BIA distinguished the Ninth Circuit decisions cited by petitioner on the ground that, in each case, one of the child's biological parents was married to the U.S. citizen stepparent at the time of the child's birth. *Id.* at A28. Accordingly, the BIA concluded, the child in each of those cases could acquire citizenship under 8 U.S.C. 1401 because the child was not born out of wedlock. *Ibid.*

4. The court of appeals denied the petition for review of the BIA's decision in a published opinion dated March 16, 2009. Pet. App. A1-A23. The court held that the BIA had correctly distinguished *Scales* and *Solis-Espinoza* because in each of those cases a biological parent was married to a United States citizen at the time of the child's birth. *Id.* at A12-A13. The court of appeals held that petitioner, on the other hand, was born out of wedlock, rejecting petitioner's reliance on Section 230 of the California Civil Code. *Id.* at A13. Section 230, the court held, "applies only to fathers legitimating their illegitimate *biological* children." *Id.* at A14. The court found no authority for the proposition "that an alien parent who is unmarried at the time of the birth of a person

who later claims citizenship may be deemed to have been married to a citizen at the time of birth." *Ibid.* Finally, the court of appeals held that petitioner could not satisfy 8 U.S.C. 1409(a), the provision concerning children born abroad out of wedlock, because petitioner did not have a blood relationship with a United States citizen. Pet. App. A14-A15. Circuit Judge Thomas dissented. *Id.* at A16-A23.

On June 18, 2009, the court of appeals denied the petition for rehearing and rehearing en banc filed by petitioner. Pet. App. A48.

ARGUMENT

1. Petitioner asserts that this Court should grant certiorari due to a number of separate errors allegedly committed by the court of appeals. But those alleged errors, even if petitioner were correct, are not questions of the type justifying review by this Court. For instance, petitioner argues (Pet. 20-25, 35) that the court of appeals' holding contravenes two prior Ninth Circuit decisions regarding 8 U.S.C. 1401 and 1409, but this Court does not exercise certiorari jurisdiction to resolve intra-circuit conflicts. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). In any event, the only other Ninth Circuit decision to address the specific issue raised here reached the same result, and this Court recently denied the petition for a writ of certiorari seeking review of that decision. See *United States* v. *Marguet-Pillado*, 560 F.3d 1078 (2009), cert. denied, No. 09-6427 (Oct. 13, 2009). Petitioner also contends (Pet. 27-34) that the court of appeals erred in its application of California state parentage law, but this Court does not grant certiorari to address applications of state law, and here the provisions of federal law are ultimately

controlling. Furthermore, petitioner does not allege that the decision below directly conflicts with any decision of this Court or the other courts of appeals, and it does not. To the contrary, as petitioner acknowledges (Pet. 26), the court of appeals agreed with the only other court of appeals decision to address similar issues. Review by this Court therefore is not warranted.

2. Moreover, the decision below is correct. Because petitioner was born out of wedlock abroad to non-citizen parents and did not have a biological connection to the United States citizen stepfather who he contends legitimated him under California state law, he does not qualify for derivative citizenship from birth under 8 U.S.C. 1401 or 1409.

a. Principally, petitioner argues (Pet. 15-20) that the court of appeals erroneously held that Section 1409(a) requires a blood relationship for a United States citizen to legitimate a person born abroad out of wedlock. Petitioner attributes this alleged error to the court of appeals' application of the current version of Section 1409, which "expressly requires a blood relationship where citizenship is being derived via legitimation." Pet. 16; see 8 U.S.C. 1409(a)(1) (requiring that a person born abroad out of wedlock establish "a blood relationship between the person and the father * * * by clear and convincing evidence"). Because the version of Section 1409 in effect at the time of petitioner's birth did not explicitly mention a blood relationship, but instead required only that "the paternity of such child [be] established," 8 U.S.C. 1409(a) (1952), petitioner argues that it did not require a blood relationship and that therefore, under that statute, he could have been legitimated by Gonzalez for citizenship purposes.

Petitioner is incorrect. The court of appeals recognized that it was required to apply the version of the statute in effect at the time of petitioner's birth, and it therefore quoted the current version of Section 1409 only after correctly concluding that it "was not amended in any relevant way between 1952 and 1986." Pet. App. A10-A11 & n.1. Biological paternity was required by Section 1409 both before and after the 1986 amendments; therefore, the amendment in 1986 expressly requiring a blood relationship effected no change in the law that would be relevant to petitioner's claim of citizenship. See *Marguet-Pillado*, 560 F.3d at 1082-1084.[1]

Petitioner mistakenly relies (Pet. 17-19) on this Court's decision in *Miller* v. *Albright*, 523 U.S. 420 (1998), as support for his assertion that the 1952 version of Section 1409 did not require a blood relationship. To the contrary, "a majority of the [J]ustices [in *Miller*] indicated an understanding that our traditions, and the 1952 version of [Section 1409], look to a blood (biological) relationship between the alleged father and the child at birth." *Marguet-Pillado*, 560 F.3d at 1082; see *id.* at 1082-1083 (quoting *Miller*, 523 U.S. at 435-436 (opinion of Stevens, J.), and *id.* at 477-478 (opinion of Breyer, J.)). As Justice Stevens explained, the new language added in 1986 was part of a broader statutory scheme that preserved the biological connection requirement in the former Section 1409, see *Miller*, 523 U.S. at 435-436, and former Section 1409 "offered no *other* means of *proving a biological relationship*" than

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[1] The decision in *Marguet-Pillado* was issued just 11 days after the decision of which petitioner seeks review here. It rejected virtually the same arguments made by a person identically situated to petitioner, and it denied his claim of citizenship. See *Marguet-Pillado*, 560 F.3d at 1082-1084.

by legitimation under state law, *id.* at 435 (emphasis added). In other words, the Court recognized that legitimation is a means of proving that a biological connection exists; it is not, as petitioner mistakenly seems to suggest, a *substitute* for a biological relationship. Cf., *e.g.*, *Quilloin* v. *Walcott*, 434 U.S. 246, 249 (1978) (describing legitimation as the act of the father regarding *his offspring* born out of wedlock); *Stanley* v. *Illinois*, 405 U.S. 645, 651 (1972) (discussing the law's recognition of "family relationships unlegitimized by a marriage ceremony" and the prohibition of discrimination against "natural, but illegitimate, children"). Furthermore, the provisions of Section 1401 to which Section 1409 refers all speak in terms of a child "born * * * of" certain classes of parents, at least one of whom is a U.S. citizen. "There can be little doubt that the 'born of' concept generally refers to a blood relationship." *Marquet-Pillado*, 560 F.3d at 1083.

Accordingly, the court of appeals correctly sustained the BIA's conclusion that under both the former and current versions of Section 1409 of the INA, petitioner could not be deemed to have acquired citizenship from birth because he did not share a blood relationship with Gonzalez.[2]

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[2] The court of appeals stated at the outset of its analysis that it would review the BIA's citizenship determination *de novo*. Pet. App. A9. Nevertheless, the court later stated in passing, as further support for its ultimate conclusion, that the BIA's determination that Section 1409(a) required a blood relationship was entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). Pet. App. A14-A15. Any apparent inconsistency between these statements, however, does not aid petitioner's case, as his arguments also fail under the more searching *de novo* standard.

b. Petitioner next asserts (Pet. 20-27) that the court of appeals erred by reading a "marriage at birth" requirement into Section 1401, arguing that such a requirement does not appear in the statute and contravenes the two Ninth Circuit decisions petitioner cited to the BIA. See *Scales* v. *INS*, 232 F.3d 1159 (9th Cir. 2000); *Solis-Espinoza* v. *Gonzales*, 401 F.3d 1090 (9th Cir. 2004). But petitioner misreads *Scales* and *Solis-Espinoza* and the reasoning of the decision below in following them. Properly understood in light of the structure of the INA, those decisions compel the court of appeals' conclusion that petitioner may not obtain citizenship under Section 1401 if neither of his parents was married at the time of his birth.

Petitioner may not qualify for citizenship under Section 1401 because he was born out of wedlock. Section 1401 applies to a child born abroad "to parents who are married"; but when the child's "parents are unwed," Section 1409(a) applies. *Tuan Anh Nguyen* v. *INS*, 533 U.S. 53, 59 (2001) (*Nguyen*); see *Scales*, 232 F.3d at 1164; *Solis-Espinoza*, 401 F.3d at 1093; see also *Marquez-Marquez* v. *Gonzales*, 455 F.3d 548, 558 (5th Cir. 2006). It is undisputed that neither of petitioner's parents was married at the time of his birth, so if he is to qualify for citizenship from birth, he must satisfy the requirements of Section 1409 (which, as explained *supra*, he does not). As the court of appeals correctly recognized (Pet. App. A12-A14), *Scales* and *Solis-Espinoza* rested on the conclusion that, because a biological parent of the petitioner in each of those cases was married to a United States citizen at the time of the petitioner's birth, neither petitioner was deemed to be born out of wedlock; therefore, they could qualify for citizenship from birth under Section 1401, rather

than Section 1409. See *Scales*, 232 F.3d at 1164; *Solis-Espinoza*, 401 F.3d at 1094. Accord *Marguet-Pillado*, 560 F.3d at 1083.

Nevertheless, petitioner argues that under California law, he may retroactively be deemed to have been born in wedlock so long as he is legitimated under California state parentage law. Petitioner is wrong. The requirements of Section 1401 must be satisfied at the time of the birth of the child; subsequent events (such as a later marriage or legitimation under state law) cannot change the circumstances present at the time of the child's birth. Pet. App. A12-A13; see *Marguet-Pillado*, 560 F.3d at 1083-1084; *Marquez-Marquez*, 455 F.3d at 559-560. Legitimation has traditionally been a means by which parents may obtain parental rights over their biological but illegitimate children, and those children may obtain rights of inheritance and succession and avoid becoming wards of the state. *Michael H.* v. *Gerald D.*, 491 U.S. 110, 124-126 (1989) (plurality opinion). But state legitimation law has never been thought to create a fiction that the child was retroactively born in wedlock for U.S. citizenship purposes.

It is true that *Solis-Espinoza* referred to Cal. Civ. Code § 230 (West 1954) in the course of determining that the petitioner there was not born out of wedlock. See 401 F.3d at 1093-1094. But as courts have later recognized, that holding was likely based in larger part on the fact that the petitioner's biological father was married to the petitioner's United States citizen stepmother when the petitioner was born. See *Marguet-Pillado*, 560 F.3d at 1083; *Marquez-Marquez*, 455 F.3d at 559. Most critically there, "the circumstances described by [Section 1401 were] met *at birth*." *Marquez-Marquez*, 455 F.3d at 559 (emphasis in original); see *Nguyen*, 533 U.S.

at 68 (recognizing that "the moment of birth" is the "critical event in the statutory scheme and in the whole tradition of citizenship law"). As the court of appeals recognized (Pet. App. A15), it would be strange to think that Congress intended to allow a United States citizen to confer citizenship from birth on a child born abroad to unmarried parents, none of whom the citizen had even *met* at the time of the child's birth, simply by holding the child out as his own at some time during the child's minority.

In any event, any conflict of the court of appeals' decision with the Ninth Circuit's prior decision in *Solis-Espinoza* is an intra-circuit conflict that does not warrant certiorari review. See *Wisniewski*, 353 U.S. at 902. Because a state statute cannot operate retroactively to render petitioner born in wedlock, California parentage law cannot allow petitioner to obtain citizenship under 8 U.S.C. 1401.[3]

c. Finally, petitioner asserts (Pet. 36-38) that the court of appeals erred by not construing the law in his favor because immigration jurisprudence and public policy favor keeping families together. Whatever the application of these principles under various circum-

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[3] Petitioner asserts (Pet. 27-31), for the first time in his petition for a writ of certiorari, that the California Uniform Parentage Act, enacted in 1975, is fully retroactive and thus should apply to his case instead of former Section 230. Although petitioner mentioned the existence of the successor statutes, he did not present this retroactivity argument to the court of appeals or the BIA or argue that the new California statute should apply to his case; thus, it is waived. See *United States* v. *United Foods, Inc.*, 533 U.S. 405, 416-417 (2001). In any event, the new statute (Cal. Fam. Code § 7611 (West Supp. 2009)), which creates only a rebuttable presumption of paternity for evidentiary burden-of-proof purposes, still cannot operate retroactively to render petitioner as born in wedlock for citizenship purposes.

stances in construing the immigration laws, this Court has made clear that determinations of citizenship and naturalization are different—provisions conferring citizenship on persons born outside the United States must be strictly construed. See *INS* v. *Pangilinan*, 486 U.S. 875, 883-884 (1988) (requiring courts' determinations as to citizenship and naturalization "to be performed in strict compliance with the terms of an authorizing statute"). Any generalized public policy or rule of construction cannot overcome the clear import of and limitations in statutes conferring citizenship on aliens born outside the United States.

The decision of the court of appeals is correct, and petitioner has not shown any reason why this Court should exercise its discretionary certiorari jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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